The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below.

/S/ RUSS KENDIG

Russ Kendig
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CHAPTER 7
GHASSAN H. KABBARA,	)	CASE NO. 07-63232
Debtor.	)	ADV. NO. 09-6117
ANTHONY J. DEGIROLAMO,	)	JUDGE RUSS KENDIG
Plaintiff,	)	
v.	)	**MEMORANDUM OF OPINION (NOT INTENDED FOR PUBLICATION)**
BANK OF AMERICA,	)	
Defendant.	)	

This matter is before the court on Defendant's Motion to Supplement its Memorandum in Opposition to Plaintiff's Motion for Summary Judgment. On June 25, 2010, Plaintiff-trustee filed a motion for summary judgment. Following an authorized extension of the response deadline, Defendant filed its response on July 22, 2010. Plaintiff-trustee filed a reply on July 29, 2010. On August 6, 2010, Defendant then filed a motion to supplement its response. Defendant references the need to supplement its response based on newly discovered evidence which may provide an additional defense to Plaintiff-trustee's claims. Plaintiff-trustee opposes the supplemental filing, as outlined in a response dated August 12, 2010.

The court has jurisdiction of this proceeding pursuant to 28 U.S.C. §§ 1334 and the general order of reference entered in this district on July 16, 1984. Venue in this district and division is proper pursuant to 28 U.S.C. § 1409. This is a core proceeding under 28 U.S.C. 157(b).

This opinion is not intended for publication or citation. The availability of this opinion, in electronic or printed form, is not the result of a direct submission by the Court.

The facts are straightforward. Trustee filed an adversary complaint on October 19, 2010 seeking the recovery of alleged preferential transfers to Defendant. Defendant included a perfunctory "ordinary course of business" defense under 11 U.S.C. § 547(c)(2) in its amended answer. (Am. Answer, ¶ 8.) Per the court's order, discovery was to conclude on April 12, 2010. Defendant was granted an extension to respond to discovery through April 20, 2010. Plaintiff's motion for summary judgment was filed more than two months later, on June 25, 2010. A trial is scheduled for September 13, 2010.

Defendant now alleges it has discovered several years of credit card statements which may support its ordinary course defense. Defendant urges the court to allow it to supplement its response. Plaintiff-trustee objects, citing prejudice, including undue delay and additional expense to the estate.

Indisputably, allowing the supplement will cause delay and most likely also require additional expenditures by the trustee on behalf of the estate. Regardless, the court cannot find that the delay or expense is undue. The Sixth Circuit suggests that undue delay may consist of tactics intended to harass or which result in ascertainable prejudice. *See, e.g.* Tefft v. Seward, 689 F.2d 637, fn. 2 (6th Cir. 1982). There is no evidence the request meets either criterion, or rises to a similar level of egregiousness. It is well known that there is a desire to decide cases on their merits. Ignoring the newly discovered evidence would be counter to this inclination.

The adversary proceeding has been pending for less than one year. Discovery closed three months prior to Defendant's request and before any review by the court. The request was made approximately one week after Defendant's reply and well over one month before the trial. The court has not issued a decision on the motion for summary judgment. It is counter-intuitive to allow newly discovered evidence to provide a basis for relief from a court's judgment or order under Federal Rule of Civil Procedure 60(b)(2), adopted into bankruptcy practice by Federal Rule of Bankruptcy Procedure 9024, yet not let the same newly discovered evidence provide a basis for relief before any decision is reached.

The motion to supplement will be granted by an order issued concurrently with this opinion.

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